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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 226

ROSARIO GAMBINO AND JOSEPH LIMA, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by either court below, the judgment of the District Court being affirmed *per curiam*. (R. 60; 16 F. (2d) 1016.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 28, 1927. (R. 61.) Petition for certiorari was filed April 20, 1927, and granted May 31, 1927 (R. 61), under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the state officers were acting as Federal agents in the enforcement of Federal Customs or Prohibition laws and in consequence were within the purview of the Fourth and Fifth Amendments to the Constitution of the United States.

2. Whether there was probable cause to search petitioners' automobile.

3. Whether the evidence was sufficient to sustain a conviction for conspiracy.

4. Whether evidence that the proprietor of the garage in front of which the seizure was made was reputed to be a bootlegger was improperly admitted on the question of probable cause for search of the car.

5. Whether evidence of the fact that petitioners were armed should have been excluded because they had permits to carry weapons.

6. Whether the trial court erred in part of the charge to the jury.

THE STATUTES APPLICABLE

Sentence was imposed upon the count based upon Section 37 of the Penal Code (U. S. C., Title 18, Sec. 88), which reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties

> to such conspiracy shall be fined * * * or imprisoned * * *.

It is claimed that the state officers were acting under authority of Section 26, Title II, of the National Prohibition Act (U. S. C., Title 27, Sec. 40), which, so far as pertinent here, provides:

> When the commissioner, his assistants, inspectors, *or any officer of the law* shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. * * * (Italics ours.)

STATEMENT

The first count of the indictment (R. 12) charged that petitioners conspired to violate the National Prohibition Act and customs laws by importing into the United States and transporting through the Northern District of New York large quantities of intoxicating liquor containing more than one-half of one per cent of alcohol and fit for beverage purposes; that pursuant thereto petitioners committed the overt act of transporting a load of Canadian ale in a Buick roadster from the Canadian boundary line into the State of New York to the place of their apprehension at Massena in the Northern District. The second, third, and fourth counts, respectively, charged the substantive offenses of import-

ing, possessing, and transporting intoxicating liquor. (R. 13, 14.)

On October 27, 1924, a motion was made to restrain the use of evidence "unlawfully obtained" through a false arrest and an illegal search and seizure of petitioners' property by New York State Troopers. (R. 14–16.) The record does not disclose any ruling thereon.

On May 15, 1925, petitioners again moved for an order restraining the use of evidence "unlawfully obtained as aforesaid," and for "the return of property unlawfully seized, as aforesaid." (R. 16.) They then objected to the filing of an answering affidavit made by one of the State Troopers because the motions had been determined by the trial court on October 27, 1924. The court overruled both the motion and the objection. (R. 16.) Thereafter a jury was impaneled. (R. 17.)

The arresting officers were State Troopers for the State of New York, Trooper Carroll having been stationed along the Canadian border in that capacity for three years and eight months and having had considerable experience with cars transporting liquor (R. 18), while Trooper Travis had eighteen months of similar experience on the Canadian border (R. 22). It was shown that the village of Hogansburg is on the border-line of Canada, fourteen miles from the village of Massena via the Massena-Hogansburg road. (R. 22.)

While the arresting officers were traveling north on the Massena-Hogansburg road at about one p. m.

on August 1, 1924, they met the petitioners traveling toward Massena from the direction of Hogansburg in a Buick roadster. The two cars passed each other at a point about three miles north of Massena (which would be about eleven miles from the Canadian border). The attention of the officers was attracted to the fact that the rear end of the Buick "hung pretty low"; that it seemed to be heavily loaded; and that its license was from the central part of the State. (R. 17, 22.)

With these observations, the officers turned and followed the Buick to Rayno's Garage in the village of Massena, where it stopped. There, according to Trooper Carroll (R. 18), Lima walked toward the garage and Travis followed him. According to the witness Travis (R. 30), Lima jumped out of the Buick and ran inside the garage, where Travis followed and brought him back. While this occurred Carroll approached the Buick and, upon request therefor, was shown Gambino's registration card. When he was asked what was in the car, Gambino told him to find out. However, when the witness requested the key to the rear compartment, Gambino refused to produce it. (R. 18.) Carroll then shook the car, heard the bottles, and asked Gambino how many cases he had. Again Gambino told him to find out. (R. 18.) Just prior to leaving the vicinity of the garage Lima said he "would not drive the car" (R. 24), and Gambino wanted to know if he could not "fix it up" (R. 24).

Thereupon Carroll drove Lima to the police station at Massena in the Buick car while Travis and Gambino rode in the officers' car. (R. 19, 30.) Upon arrival at the police station Carroll again asked for the key and was told to go ahead and find it. (R. 19.) The officer then found the key in the left side pocket of the car and, opening the rear compartment, found fourteen cases of Canadian ale (R. 19), or a total of three hundred thirty-six bottles (R. 31). After this discovery Carroll asked Lima where they got the ale. Lima did not say, but he "did say they came from Hogansburg." (R. 18.)

Both petitioners, at the time of the arrest, stated that they lived in Utica. (R. 21, 34.) When asked where they got the load, neither answered. (R. 21.)

Search of petitioners' persons at the police station revealed that each was armed (R. 21), Lima with a .25 caliber Colt automatic (R. 21) and Gambino with a .32 caliber Dreys revolver (R. 31). Each gun was loaded. (R.21, 30.) Each petitioner had a permit to carry a gun. (R. 27.)

The Buick roadster, the Canadian ale, and the guns were turned over by the State Troopers to a deputy collector and inspector of the Customs at the police station at Massena. (R. 31.) This was after the car had been completely unloaded. (R. 28.)

Petitioners made no objection to the introduction of evidence relating to the discovery and seizure of the liquor on the grounds of an illegal search until the Government's final witness had taken the stand.

He was a Government chemist whose sole testimony related to the alcoholic content of the liquor. (R. 34, 35, 42–44.) Against this evidence, it was objected that the samples analyzed had been procured without any warrant or other authority in violation of petitioners' rights under the Fourth, Fifth, and Sixth Amendments, and that the action of the arresting officers was not authorized by Section 26, Title II, of the National Prohibition Act nor by any state law. (R. 34, 35, 42.) The objection was overruled. (R. 42.)

Petitioners offered no evidence. At the close of the Government's case they moved for a directed verdict upon the alleged insufficiency of the evidence and the alleged illegality of the search and seizure. The motion was granted as to the second, or importation count, but otherwise overruled. (R. 45, 46.) The jury found against both petitioners on the remaining counts (R. 55), and each was sentenced to confinement in the penitentiary at Atlanta, Georgia, for one year and one day and to pay a fine of $10,000 (R. 55, 56). Judgment was affirmed by the Circuit Court of Appeals.

SUMMARY OF ARGUMENT

There is a total absence of facts to establish a Federal agency on the part of the state officers. The words "any officer of the law" in Section 26, Title II, of the National Prohibition Act do not so authorize the state officers to seize vehicles that they become, *ex lege*, agents of the United States.

Since state officers do not themselves have the capacity to violate the Fourth and Fifth Amendments, the adoption of the seizure, well after it had been completed, did not constitute a ratification by the United States of an unconstitutional act.

There being no agency—either in fact, by statute or by ratification—the case falls within the rule that evidence illegally acquired by others than Government officers does not necessarily violate the Constitution nor affect the admissibility of such evidence in a Federal court. The Eighteenth Amendment created no new civil rights and, therefore, did not extend the scope of the first ten Amendments.

Though there was no need to inquire into the legality of the acts of the state officers, there was nevertheless probable cause for the search, considering the close proximity to the Canadian border and the suspicious acts and utterances of petitioners, viewed in the light of long experience by the arresting officers. The shaking of the car, while technically a trespass, was not an unreasonable search, if, in fact, it was a search at all.

There was sufficient evidence to go to the jury upon the issue of conspiracy. Possession of liquor and of the guns, with the other facts and circumstances shown, permitted an inference that these men were acting in the furtherance of a common design. The attitude of neither reflected that one of them was an innocent passenger. The weight of authority among the lower Federal courts sustains the sufficiency of the evidence in this case. The

consensus of opinion among these courts is that when two men are caught doing a thing together, there is support for finding that they agreed to do that thing together. What they were doing and what they agreed to do are matters for the jury.

The reputation as a bootlegger of the proprietor of the garage at which the car stopped was admissible upon the question of probable cause to make the search.

The guns, seized at the time of the arrest, might have been implements of the crime, and the question of their relation to the transportation of the liquor was for the jury. On the issue of conspiracy, evidence of the possession of these guns was clearly admissible. That they were carried under a state permit might affect the weight of such testimony, but not its admissibility.

The charge as to Lima was fair and clearly presented the issue to the jury. That portion objected to was given in a résumé and in explanation of the theory that Lima was but an innocent passenger. So given it was not prejudicial.

ARGUMENT

I

STATE OFFICERS, ACTING INDEPENDENTLY, ARE NOT AGENTS OF THE UNITED STATES; AND IF THEY OBTAINED EVIDENCE ILLEGALLY, IT WAS NEVERTHELESS ADMISSIBLE IN THE PROSECUTION IN A FEDERAL COURT

There is no evidence whatever to show cooperation between the State Troopers who made the

other officers of the United States." That decision also noted that other provisions of Section 26 for approval of bonds by the seizing officer on release of the seized vehicle seemed inappropriate to other than officers of the United States.

The Circuit Court of Appeals for the First Circuit agreed with the conclusion of the District Court—that Section 26 confers authority only upon officers of the United States. (*The Ray of Block Island*, 11 F. (2d) 522.) Upon a writ of certiorari granted by this Court, the judgment of the Circuit Court of Appeals for the First Circuit was affirmed. (*Dodge* v. *United States*, 272 U. S. 530.) While the opinion of this Court did not specifically decide whether "any officer of the law" included others than Federal officers, this Court did hold that the seizure by local officers could be adopted by the United States. This holding clearly indicates that the original seizure by such officers had not been previously authorized by Section 26, for an act so previously authorized would require no subsequent adoption.

All that was done by officers of the United States in this case was done long after the seizure had been completed. After the Buick roadster had been unloaded at the police station in the village of Massena (R. 28) the cargo and the guns were turned over by the arresting officers to an officer of the customs. The acceptance thereof by this Government officer was not an act which deprived petitioners of any right under the Fourth and Fifth

Amendments. The Government might, with equal propriety, have allowed the seized articles to remain with the state officers and later secured their production by a *subpœna duces tecum*. Neither course would have encountered constitutional objection. (*Burdeau* v. *McDowell*, 256 U. S. 465, 475.) Certainly the acceptance of this property by the Government officer was not a ratification of an unconstitutional act, for the arresting officers, acting independently of Federal agents, did not have the capacity to commit an act violative of the Fourth and Fifth Amendments. It being well established that these Amendments do not apply to state officers, the act of the Government officers, if it be a ratification of anything, must be considered as an adoption of an act constitutionally unobjectionable. (*Robinson* v. *United States* (C. C. A. 9th), 292 Fed. 683.)

Since there was no Federal cooperation in the making of this search and seizure, the rule announced in *Byars* v. *United States*, 273 U. S. 28, does not apply. It has been pointed out that no Federal agency was created by Section 26, Title II, of the National Prohibition Act. It appears, therefore, that this case falls within the rule, long regarded as settled, that the use by prosecuting officers of evidence illegally acquired by others than Government officers does not necessarily violate the Constitution of the United States nor affect the admissibility of such evidence in a Federal court. (*Weeks* v. *United States*, 232 U. S. 383, 395; *Adams*

fied in believing his suspicions were confirmed and that he then had probable cause for the search.

Considering that the search in this case occurred much nearer a troublesome frontier than that in *Carroll* v. *United States*, 267 U. S. 132, it is submitted that there was even a greater degree of probable cause than that which existed at Grand Rapids, Michigan—152 miles from the customs barrier.

III

THE EVIDENCE WAS SUFFICIENT UPON THE CONSPIRACY COUNT

It is urged that the trial court erred in denying the motion of petitioners to direct a verdict of not guilty upon the ground that the evidence was insufficient. (R. 44, 45.) At the close of the Government's case the defendants rested and filed their motion for a directed verdict upon each count of the indictment. The motion was sustained upon the importation count. (R. 45.) Since petitioners were sentenced (R. 55, 56) only upon the first, or conspiracy count, and since the sentence exceeded that which could have been imposed upon the third and fourth counts of the indictment, it will be necessary only to consider whether the evidence was sufficient to go to the jury upon the question of conspiracy.

A cardinal principle for determination of the sufficiency of the evidence is that the evidence is sufficient if it shows such concert of action in the commission of the unlawful act or other facts and

circumstances from which the natural inference arises that the unlawful act was in furtherance of a common design. (See *Keith* v. *United States* (C. C. A., 6th), 11 F. (2d) 933; *Burkhardt* v. *United States* (C. C. A., 6th), 13 F. (2d) 841.) These facts and circumstances from which such natural inference may arise should be viewed, when considering their suffiiency, in the light of the rule taken from the common law. In *Gardner* v. *Preston*, 2 Day (Conn.) 205, 209, it is said:

> The greater the secrecy that is observed, relative to the object of such concurrence, and the more apparent the similarity of the means employed to effect it, the stronger is the evidence of conspiracy. (1 East P. C. 97.)

The facts and circumstances in this case, it is submitted, are sufficient to warrant a conclusion of a common design to transport a quantity of well-hidden liquor. It is entirely proper to infer that the purpose for their being armed was common to the protection of the liquor they carried. The two men were both from Utica. (R. 21, 34.) They both rode together from Hogansburg (R. 18) on the Canadian frontier (R. 22). The court and the jury can judicially know that the vicinity is one where the smuggling and transportation of liquor from Canada are frequent occurrences. (*Carroll* v. *United States*, 267 U. S. 132, 160.) The key to the compartment was hidden, apparently for the purpose of facilitating a defense for the man who was

not driving at the time a search might take place. Furthermore, the conduct of each of these men, considered separately, indicated guilty knowledge of the contraband liquor. Gambino tried to "fix it up." (R. 24.) Lima jumped out of the Buick and ran inside the garage, from which place he was brought back by one of the officers. (R. 30.) Gambino brazenly told the other officer to find out for himself what was in the car, but refused to produce the key to the rear compartment. (R. 18.) Upon their arrival at the police station, this same course of conduct was pursued by the petitioners.

It is urged that Lima may have been but a passenger in the car and if so was not guilty of a conspiracy. However, Lima's attitude was anything but that of an innocent passenger. He was given ample opportunity to indicate his innocence, if true, when Trooper Carroll asked him where they got the ale. He did not say, but he "did say they came from Hogansburg." (R. 18.) Clearly this conduct on the part of Lima, after the ale had been discovered, would not comport with the conduct one might expect from an innocent passenger without knowledge of the liquor in the car. Since "human nature is something whose action can never be ignored in the courts" (*Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.*, 174 U. S. 674, 688), the jury were entitled to draw from his actions the inference that he was not a mere passenger. The elements of improbability are too strong to be disregarded. Furthermore, both petitioners

were asked where they got the load and neither answered.

The sufficiency of the evidence to support a charge of conspiracy to transport liquor where two men are arrested in an automobile has been passed upon by several of the Circuit Courts of Appeals. Petitioners rely on the decision of the Circuit Court of Appeals for the Sixth Circuit in *Stafford* v. *United States,* 300 Fed. 537. Here two men were in a car loaded with liquor. When followed, they drove at about fifty-five miles an hour until they met with an accident. Then the driver of the car tried to run away, but the other defendant did not run. It was held that this was insufficient to sustain a verdict under Section 37 of the Penal Code, the court saying (p. 540), "The fact that he was riding in the car with Stafford is a suspicious circumstance, but suspicious circumstances do not constitute proof of guilt beyond a reasonable doubt." However, there is a distinction between the facts of this case and the facts of the *Stafford case.*

Considering the circumstances that, upon the approach of the officers, petitioner Lima tried to run away, the facts fall within the rule of *Windsor* v. *United States* (C. C. A., 6th), 286 Fed. 51. Here the evidence was that one man was driving a car which carried liquor and that the other man ran when the arrest was made. It was held that the evidence was sufficient to show a conspiracy. Thus, under the precise facts of this case, without consid-

ering the fact that both men were armed, the rule in the Sixth Circuit is in accord with the contention of the Government in this case. Furthermore, the rule in the Sixth Circuit in the *Stafford case* was modified in *Clark* v. *United States* (C. C. A., 6th), 4 F. (2d) 382, where the sufficiency of the evidence against the alleged passenger was challenged under the rule in the *Stafford case* and the court held *per curiam:*

> The jury might well have thought it insufficient; but, considering the elements of improbability in Ronaldi's story and conflicts between his story and that of Clark, we are not satisfied that there was error in submitting this issue to the jury.

Jianole v. *United States* (C. C. A., 8th), 299 Fed. 496, can be distinguished from the instant case. Nothing more was shown than that two men were in a car with liquor. It was not shown, as in this case, that both men were from the same city; that both came in the loaded car from a place where liquor might easily be secured, nor that both of the men were armed to protect, if necessary, the liquor they carried.

On the other hand, the weight of authority among the Circuit Courts of Appeals supports the view that the evidence was sufficient. Thus in *Murry* v. *United States* (C. C. A., 8th), 282 Fed. 617, the liquor car containing two men was chased for two or three miles and stopped only when one of the tires was punctured by a bullet. Yet the court

held that this was sufficient. And in *Hilt* v. *United States* (C. C. A., 5th), 12 F. (2d) 504, it was considered sufficient that the evidence disclosed that two men on a boat with liquor had, upon discovery, changed their course and attempted to escape. In this case the court said (p. 505):

> Proof of what conspirators do is usually in the nature of things the only proof available to the prosecution of what they agreed to do.

Goukler v. *United States* (C. C. A., 3rd), 294 Fed. 274, presents the situation of two men on a boat with liquor without the element of an attempted escape. This evidence was held sufficient to support a conspiracy count, it being pointed out (p. 276) that:

> Being on the boat under circumstances which might raise a valid inference of participation in the several crimes charged against them, their presence and the purpose of their presence were matters for the jury. It was also the province of the jury to determine from the evidence what the defendants were doing and whether they had conspired to do the thing they were caught doing.

In *Simpson* v. *United States* (C. C. A., 4th), 11 F. (2d) 591, it was said that there could be no question about the sufficiency of the evidence as to the driver of the car and his companion where the evidence against them consisted only of testimony that they were arrested together in possession of the liquor and that they had the day before been

seen talking together. In *Fisher* v. *United States* (C. C. A., 4th), 2 F. (2d) 843, 846, it was significantly said:

> It hardly need be said that a conspiracy is often proved by the overt act. The fact that two men are found together breaking into a bank is indubitable proof that they had agreed to commit the burglary.

Though not raised on a motion for directed verdict, a similar question was presented in *Shook* v. *United States* (C. C. A., 5th), 10 F. (2d) 151. It was there held that evidence that two men were in a car with liquor is sufficient proof of the *corpus delicti* to warrant the admission of statements made by each, since "evidence of the cooperation or concert of action of the accused in the possession and control of the liquor furnished support for a finding that they had agreed or conspired to do so."

IV

EVIDENCE OF FRANK RAYNO'S REPUTATION WAS NOT IMPROPERLY ADMITTED AND, IF SO, WAS NOT PREJUDICIAL

It is urged that the trial court erred in admitting evidence by Trooper Carroll that Frank Rayno had the reputation of being a big bootlegger, because Frank Rayno was a stranger to the case. Petitioners voluntarily stopped in front of Rayno's garage in the village of Massena (R. 18), and Trooper Carroll had known Rayno for about a year (R. 18).

The matters complained of arose in the following manner (R. 18, 19):

> Mr. BREED. Do you know what his reputation is up in that section with reference to bootlegging?
>
> The COURT. It has no bearing on any of the charges here.
>
> Mr. BREED. But their stopping at this garage.
>
> The COURT. Did he say the car stopped in front of Rayno's garage?
>
> Mr. BREED. Yes, sir, and one of them got out and started to go in and the other one was in the act of getting out.
>
> The COURT. It is admissible, not as to whether or not the defendants committed any of the crimes. As to those things, it is not competent and material at all, but it has a bearing on whether or not they had reasonable grounds to suspect that the automobile contained intoxicating liquors. So, on that ground and on that ground alone, the Jury will understand the objection is overruled.
>
> * * * * *
>
> The WITNESS. He has a reputation of being a big bootlegger.

The questions answered were then stricken at the request of Government counsel, and the following occurred (R. 19):

> Mr. BREED. Did you know at that time on August 1st, 1924, what Mr. Rayno's reputation was for bootlegging up in that section?

The court overruled objections, stating its reason for so doing as before.

> The WITNESS. He had the reputation of being a bootlegger.

Probable cause, according to the authorities reviewed in *Carroll* v. *United States*, 267 U. S. 132, 159–162, consists of a reasonable ground for belief based upon the facts and circumstances known to the arresting officers and *of which they had reasonably trustworthy information*. The view that "information" would justify probable cause indicates that hearsay evidence is admissible to establish probable cause. When a portion of the country and the smugglers who infest it are pertinent to the question of probable cause (*The Apollon*, 9 Wheat. 362, 374), certainly the man before whose garage petitioners voluntarily stopped is not such a stranger to the case that information concerning his activities is incompetent on the same question. And the information, having reached the proportions of a reputation, could scarcely be other than "reasonably trustworthy."

Furthermore, the ruling of the court made it plain to the jury that this testimony was not admissible, and was not to be considered by them, on the issue of guilt or innocence of the defendants. That this evidence was admitted for a limited purpose and for the court alone upon a question of law was further impressed upon the jury by withdrawing from them entirely the question of the legality

of the search and of probable cause therefor. In his charge the court said (R. 46):

> I may say also at the outset that there is no question for you to decide here as to whether these Defendants were lawfully stopped and apprehended and arrested and their automobile and its contents seized. That is a question of law which the Courts, supposedly trained in the law, are called upon to decide. It is not a question of any kind for the jury.

Though he reviewed the facts in the case in his charge (R. 49), the court refrained from any comment regarding Rayno's reputation. Obviously the jury understood from all of this that they were not to consider, on the question of guilt or innocence, the evidence of such reputation. In the light of the instructions given them, it is not to be supposed that they did so consider it.

V

EVIDENCE THAT PETITIONERS WERE ARMED WAS PROPERLY ADMITTED

It is claimed that testimony by the arresting officers was improperly admitted to show that a revolver and a pistol with cartridges for each were taken from both petitioners. It is argued that this evidence became inadmissible in view of the fact that it was developed on cross-examination that each of the petitioners had a permit from the State of New York to carry such a weap-

Obviously these men had procured permits to carry the weapons in order to avoid prosecution under the state laws. (See McKinney's Consolidated Laws of New York, Book 39, Section 1897.) Though their motive might have been to comply with the laws of the State of New York, it by no means follows that there was an entire absence of any other motive in carrying these weapons. That they were thus licensed to carry weapons might affect the weight of the testimony, but it could in no wise affect its admissibility.

Every fact which has a bearing on or a tendency to prove the ultimate fact in issue or to throw light upon the relation of the parties and their purpose may go before the jury. (*Thiede* v. *Utah*, 159 U. S. 510; *Clune* v. *United States*, 159 U. S. 590.) Great latitude is allowed in the reception of testimony revealing such circumstances. (*Williamson* v. *United States*, 207 U. S. 425.) It can not be seriously contended that, when two men are riding with a load of liquor, the fact that they are armed has no relation to the transportation of that liquor.

Petitioners claim that the admission of this evidence, however, was unduly harmful in view of the accentuating remarks by the trial court in his charge to the jury (R. 50)—

> that it could not be by a coincidence that two men from Utica could be up there in a car so near the Canadian line, driving from one place near the Canadian line on the way back towards Utica, each with a revolver loaded;

> that it could not be a coincidence, that it must have been pursuant to an agreement.

The remark attributed to the court, however, was not entirely as quoted. The record discloses (R. 50), that the paragraph containing the above excerpt was prefaced by a statement that "The government says by that proof it has established that * * *." In this form the statement of the trial court was harmless.

VI

THE CHARGE WAS NOT IMPROPER AS TO LIMA

Objection is made to that portion of the instructions wherein it was charged (R. 50):

> If that be so, then, as far as the Defendant Lima is concerned, he is not guilty of conspiracy, he is not guilty of any other offense if he was in entire innocence of the fact that there was anything unlawful in that car or that any crime was being committed, or that any conspiracy had been made.

It is urged that this charge inferentially amounted to a direction to find both of the defendants guilty unless the jury believed that Lima was innocent and in utter ignorance of any violation of the law.

The portion of the charge objected to was immediately preceded by a summary of the defendants' contentions as follows (R. 50):

> The Defendants contend that the evidence does not warrant any such inference. The Defendants say there were no bottles visible,

> that there is nothing to indicate that the one Defendant, Lima, had any knowledge that there were any bottles there, and had no knowledge that any law was being violated; that the evidence does not show but that he was a passenger; that he was there by accident, or that he was there without any reference to any crime and not in carrying out any agreement, and that he was there and that he was in the car an entirely innocent man and in utter ignorance of the fact that any law was being violated, or that there were any intoxicating liquors in the car.

It is difficult to see any objectionable features in this charge, particularly in view of the fact that the court had theretofore charged the jury that if they were satisfied beyond a reasonable doubt that there was an agreement and that these men were doing something in carrying out that agreement, they could return a verdict of guilty.

CONCLUSION

It is submitted that the judgment and sentence should be affirmed.

Respectfully submitted.

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